IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-781

PENTAGON CITY COORDINATING COMMITTEE, INC., ET AL., *Petitioners,*

v.

THE ARLINGTON COUNTY BOARD, ET AL., *Respondents.*

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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PRELIMINARY NOTE ON THE OPPOSING BRIEFS

Ordinarily a reply brief of this kind would immediately address the merits of the arguments presented in the opposing brief or briefs. In the instant case, however, because of the unusual nature of both of the two opposing briefs, we feel constrained to make a preliminary comment on the argumentative technique used in those briefs.

The would-be developers of the Pentagon City tract have apparently retained special counsel for the purposes of opposing our petition for certiorari. Those counsel did not participate in the trial and may not have had a chance to read the trial record. In any event, the developers' new counsel have opposed the

petition on the basic ground that it has "grossly distorted" the facts and is based upon "fundamental" factual "errors" (Dev. Br. 5, 7 [1]), with the alleged result that the constitutional issue for which petitioners seek review is not actually presented on this record.

It can be readily demonstrated that these serious charges of distortion are without substance. Instead of burdening the main body of this brief with a detailed demonstration of that fact, we have set such a demonstration forth in an appendix to this brief, but in order to illustrate the insubstantiality of the charges it may be appropriate here to refer briefly to two of "the particular examples" of the alleged "gross distortion" (Dev. Br. at 5):

(1) In order to give the Court some flavor of the magnitude of the proposed Pentagon City development, our petition referred to the proposed development's "huge physical plant, including a series of 22-story buildings with a vast physical capacity" (Pet. at 5). The developers' opposing brief asserts that this description constitutes "fundamental error" (Dev. Br. at 5, 7), their main point being (apparently) that there will be "only 4 such buildings" and that the number "4" does not constitute a "series". The comment is totally without substance. One of the five parcels of land making up the Pentagon City tract will contain not only four 22-story buildings but a number of 16-story buildings as well (XIX at 26), and other parcels will contain additional 16-story buildings (XVII at

[1] The opposing brief filed by the would-be developers (the brief with a red cover) will be cited herein as "Dev. Br." The opposing brief filed by the Arlington County Board (the brief with the white cover) will be cited as "Bd. Br." Our petition for certiorari will be cited as "Pet."

151-60). Moreover, the opposing brief of the Board states (we assume accurately) that the physical plant on the property will be equivalent to "a two-story building over the entire tract" (Bd. Br. at 8), meaning that the physical facilities will have more than 232 acres or 10,200,000 square feet of floor space, "vast" in any terms. If that be "fundamental error" or "gross distortion" which undercuts our petition for certiorari, so be it.

(2) In our petition (at p. 5, Para. 5) we asserted that the developers' own incomplete traffic report (the Pratt report), which constituted the only traffic analysis underlying the Board's decision, "showed, without dispute," that there would be "jammed traffic conditions" at at least three intersections on the tract—and we emphasized that if Mr. Pratt or the County staff had statistically computed the *consequences* of those three "jams" (as was later done at the trial, at considerable expense to petitioners [2]) the Board would have realized immediately that they were bound to cause a total breakdown in the traffic system and dangerous air pollution (Pet. at 5-6). The developers' brief now says that we have "grossly distorted" the facts because there was a "dispute" as to whether the three intersections would be jammed (Dev. Br. at 8).

The comment is both pointless and misleading. During the Board proceedings Mr. Pratt himself stated repeatedly that F-levels of service ("jammed conditions") would exist at the three intersections, and neither he nor anyone else suggested that they would not (XX at 49-50). Thus there was no dispute at all before the Board. It was not until the trial, more than

[2] See pp. 10-11, *infra*.

eight months later, that Mr. Pratt, realizing that his clients' interests were in jeopardy, expressed the newfound personal opinion that the technical calculations used by all professional traffic engineers (including himself) to predict traffic conditions may not be reliable (an after-thought which was overwhelmingly refuted by three of the most distinguished traffic engineers in the country) (VI at 41-46; XXII at 45; XXIII at 27-28). The fact remains that the Pratt report *did* say to the Board, without dispute, that there would be jammed traffic conditions on tract, and the Board flatly refused all requests of petitioners to evaluate their consequences for the traffic system as a whole.

As previously noted, the appendix to this brief will demonstrate that none of the developers' other charges of "gross distortion" and "fundamental error" is any more substantial than the two discussed above.

With respect to the opposing brief filed by the Arlington County Board, it will be observed that the brief consists in large part of factual assertions without record citation. In many if not all instances the assertions are in error, as demonstrated in the appendix, but in any event we would urge that the Court give no weight to any Board assertions for which no record support is supplied.[3] Where the Board's brief asserts that the petition for certiorari is factually in error, we have also dealt with those issues in the appendix.

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[3] One example of the Board brief's unsupportable assertions will illustrate the point. The brief flatly states (at p. 10) that the statistical analysis of the traffic back-ups or "queues", as presented at the trial, was based on "false assumptions". No record citation is provided, and the statement is incorrect. In fact the studies were verified by expert testimony (V at 21-22).

Putting these preliminary matters to one side, we can restate the three *essential* facts underlying the present petition for certiorari:

(A) The transportation analysis prepared by the developers and presented to the Board flatly predicted "jammed traffic conditions" at three intersections but did not in any way consider what effect those traffic jams would have on neighboring intersections and hence upon the traffic system as a whole (Pet. at 5-7). ***That fundamentally important fact is nowhere denied in the opposing briefs.***

(B) The statistical analysis of the consequences of those three traffic jams, as presented at the trial and verified for accuracy by Mr. Pratt himself (XIV at 3-13), firmly forecasts a total breakdown in the total traffic system if the Board-approved development goes forward (Pet. at 8-9). ***That fact is nowhere denied in the opposing briefs.***

(C) The Board was explicitly warned that the developers' traffic analysis was inadequate and that the only responsible course would be to assess the traffic situation as a whole before reaching a decision on the proposed development.[4] That essential fact is nowhere denied in the opposing briefs.[5]

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[4] Pet. at 6. See also PX 7, PX 37, and PX 53, each of which was offered in evidence at the trial and excluded on grounds of relevance.

[5] The Board's opposing brief states as follows: "Although the Board may have been warned about possible traffic congestion in 1990, *no experts in the field* ever warned the Board, except the [Pratt] study . . ." (Bd. Br. at 9-10). That study, in which the developers' own expert projected traffic jams, should have been warning enough, and the Arlington County Transportation Com-

As demonstrated below, these three essential facts present a pure issue of law which deserves to be heard and resolved by this Court.[6]

ARGUMENT

I. The Opposing Briefs Simply Do Not Address the Novel and Important Constitutional Issue Presented Here.

The opposing briefs take the position that our petition presents merely a conventional and unimportant *substantive* due process zoning issue "in the guise of" a procedural due process issue (Dev. Br. at 10). A somewhat over-simplified illustration may be useful in demonstrating that that is incorrect.

On the one hand, suppose that the proponent of a new zoning decision argued to the zoning board that the zoning would have advantage A for the community and that the opponents argued that advantage A was counterbalanced and outweighed by disadvantage B. Suppose further that the zoning body weighed A against B and granted the requested zoning. Obviously the many cases cited in the opposing briefs stand for the proposition that, so long as the Board's decision could have been reached by reasonable men (*i.e.*, so long as the issue was "fairly debatable" and the decision rational and noncapricious), the courts are not at liberty to substitute their judgment for that of the Board. That proposition, which is asserted again and again in the opposing briefs, is not contested by these petitioners here.

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mission and numerous citizens added loud warnings as well (Pet. at 6). Why more "expert" warnings should have been given is unclear.

[6] Our opponents' suggestion that the constitutional issue was not raised and decided below is discussed at pp. 12-14, *infra*.

But suppose that, after the proponent had presented its arguments with respect to advantage A, the opponents of the proposed zoning had come before the Board and said in effect, "There is demonstrably good ground to believe that the proposed zoning will have disadvantage B, but we do not have the resources to explore the problem fully, and we ask the Board to investigate the question whether the proposal will have that disadvantage before it reaches a decision"—and suppose that the Board had then refused to investigate and determine whether any such disadvantage would exist. It is the petitioners' position that, where the Board's decision adversely affects private property rights, such a decision would be procedurally improper and invalid, even though approval of the project would have been proper *if* the Board had investigated problem B and struck its own balance between A and B.[7]

We strongly disagree with the developers' suggestion that the distinction suggested above is "rhetorical rather than substantial" (Dev. Br. at 10). It is one thing to say that a zoning body can properly approve a project *after* evaluating its disadvantages, but it is quite another thing to say that a zoning body can properly approve a project without pausing to find out what its disadvantageous consequences will be. The differ-

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[7] We trust that the discussion in the text lays to rest the developers' suggestion that we are claiming that traffic congestion is the paramount factor that a zoning body must consider and that it "eclipses all other factors" (Dev. Br. at 12, n.7). Obviously such a body must consider all public welfare factors, of which traffic congestion and air pollution are only two. On the other hand, the Virginia zoning statute explicitly emphasizes the importance of considering "congestion in the public streets" and related problems of public health, safety, and general welfare. Virginia Code § 15.1-489.

ence, obviously, is that no one can tell whether the zoning body's actual decision would not have been different if it *had* understood the consequences of its action. Once such a body has made an *informed* and rational judgment, obviously a court cannot substitute its own, but if a zoning body has reasonably been requested and unreasonably refused to inform itself in order to reach such a judgment, the courts can and should require it to do so. In our submission, the procedural due process strictures of the Fourteenth Amendment do not permit a state zoning body to refuse to evaluate the consequences of a proposed development when a responsible showing has made that potentially it will have a serious but as yet unmeasured adverse impact on surrounding properties.

Apparently the developers contend that if a zoning body does not investigate an obvious potential problem before reaching a decision, and if the problem is later explored at a subsequent trial, the judicial proceeding can "be taken into account" (Dev. Br. at 16) and treated as curing the zoning body's failure to address the problem itself. But this contention in effect assumes that, when the reviewing court addresses the problem, its performs essentially the same function performed by the zoning body and that, even though the proper "legislative" weighing function was not fully performed by the zoning body, the process can be completed at the judicial level. Obviously this is incorrect. It would be wholly improper for the court to make any such "legislative" judgment (as properly observed by the trial court below, Pet. App. at 3a). Where a zoning body has failed to perform the weighing function in full (*e.g.*, by failing to investigate and measure the dimensions of an obvious public welfare

problem which will potentially arise from a proposed development), only the zoning body itself can properly complete the task, and judicial approval of such a zoning decision as being "fairly debatable" does nothing to cure the procedural defect in the zoning procedure.

It is true, as emphasized in the opposing briefs, that this precise procedural issue has never been decided by this Court (see Dev. Br. at 15; Bd. Br. at 11). The reason appears to be that in the past, whenever a zoning body has approved a development project without investigating potential problems of the kind involved here, the state courts have *uniformly* reversed and remanded under the mandates of their own state statutes, thus eliminating any occasion for review by his Court. (See the several state cases cited in the petition at page 14.) Indeed, it is precisely because this Court has never had an opportunity to deal with this novel constitutional issue that it was necessary to file the instant petition for certiorari.[8]

Putting the present arguments of our opponents in their best light, they seem to amount to a contention that the private citizens who brought this case had an

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[8] We disagree with our opponents' reading of Citizens Association of Georgetown, Inc. v. Zoning Commission of D.C. (cited in Pet. at 13; see Dev. Br. at 15, n.10). In the portion of the opinion on which we rely (which may be regarded as dictum) the court looked to the substantive constitutional standard (that a zoning decision must not be arbitrary or capricious, having no substantial relationship to the general welfare, 447 F.2d at 407) and also to a zoning body's "public interest mandate"—and from them (rather than "the D.C. Administrative Procedure Act," Dev. Br. at 15, n.10) the court found a duty on the part of the zoning body to investigate the consequences of a proposed project before approving it.

"opportunity to press their views" before the Arlington County Board (Dev. Br. at 14) and that that forecloses these petitioners from challenging the procedure followed by the Board. That contention, however, merely highlights one of the most important aspects of the case. In order to present their rezoning application to the Board in its most favorable light, these developers hired a consulting firm and paid it $500,000 to plan the development and persuade the Board to approve it.[9] The consulting firm, in turn, paid their hired traffic analyst (Mr. Pratt) $50,000 to prepare and present his dramatically incomplete traffic analysis (XII at 68-74). Other things being equal, an equally effective countering presentation by opposing private citizens (who, unlike the County, do not have staff engineers at their beck and call) might be expected to have cost equal sums.

Although resources of these dimensions are apparently available to developers of the sort involved here, it is obviously unrealistic to expect private homeowners like these petitioners to bring equivalent resources to bear in evaluating and, if necessary, challenging such a proposal. It follows that, if the potential disadvantages of a development of this kind are to be analyzed and presented to the zoning body, the task must be done at public expense—*i.e.*, by the local government involved. Otherwise adversely affected homeowners will plainly be deprived of due process. Here the petitioners

[9] The principal spokesman for the developers during the Board hearings was a Mr. Dewberry, who explicitly testified at the trial that his firm was paid $500,000 for their planning and presentation to the Board and that one of the firm's principal functions was "to try to persuade the Arlington County Board" to approve their client's proposals (XIX at 7-9).

explicitly beseeched the Board to order the County's professional staff to evaluate the "serious transportation problems" suggested by the Pratt report, pointing out that a few "volunteer citizens" lacked the resources to do so,[10] but no such evaluation by the County staff was ever made (XVII at 24).

We respectfully submit that it is time for this Court to consider whether such conduct on the part of a state zoning body does or does not violate the procedural due process rights of those private property owners who will be adversely affected by the body's action. Where a would-be developer has spent $500,000 in an effort to persuade the Board to accept his proposal, and where the public agencies which have the resources to evaluate the proposal and investigate its adverse consequences on other property owners have refused to do so, we say that the due process procedural rights of such property owners have been violated.

Finally as to the merits, we should note that the opposing briefs seriously overstate the holding for which we contend. They claim that we are asserting "the extraordinary proposition" that due process requires zoning bodies "to withhold zoning decisions until they have independently investigated *and reinvestigated,* to the satisfaction of all persons concerned, every ramification of their decisions which offends someone's notions of what is 'acceptable' " (Dev. Br. at 15, emphasis

[10] Exactly such an exhortation was made by one of the present petitioners in a statement which was made to the Board, offered in evidence at the trial, and excluded by the trial court (PX 53 for identification). That evidentiary ruling was challenged on appeal to the Supreme Court of Virginia but summarily upheld (Pet. App. B).

added). Obviously we seek no such holding.[11] We simply say that in the circumstances of this case, where *some* additional professional analysis by the County's professional traffic engineers would have shown the true dimensions of the traffic consequences of the proposed development (as fully demonstrated at the trial below), the Board's approval of the project must be reversed and remanded to allow the Board to decide whether they really want to force the public and these petitioners to live with the real traffic consequences. With respect to the Board-approved Pentagon City development, that is an issue which the Arlington County Board has never faced, and we contend that under the Fourteenth Amendment they must be required to do so now.

II. The Procedural Due Process Issue Raised by This Petition Was Properly Raised Below

The opposing briefs contend that, although the due process issue raised by the petition was properly raised before the trial court (that much seems to be conceded), it was not presented to the Supreme Court of Virginia. We disagree. To go back one step, the original Complaint (properly known as the "Petition for Declaratory Judgment") clearly stated that under the Fourteenth Amendment the Board had an affirmative legal duty to "evaluate" the extent to which the traffic congestion and environmental pollution resulting from the proposed development would adversely affect the prop-

[11] Nor are we claiming (as suggested at Dev. Br. 11) the right "to probe the mental processes of a legislative body." We assert only the right to demand that such a zoning body make some reasonably adequate factual investigation of obvious potential problems before reaching a decision.

erty rights of the plaintiffs and that the Board had violated that constitutional duty (see Pet. at 7-8). Nothing, we submit, could have stated the issue more clearly. And when these petitioners presented their "Assignments of Error" to the Supreme Court of Virginia, their second "assignment" read as follows:

> "2. Was the lower court correct in sustaining the Board's action in approving a rezoning application and a transportation plan without evaluating the dimensions of the traffic and pollution consequences thereof?" (Petition for Appeal at 6).

That "assignment" precisely stated the issue now raised by the petition for certiorari. Moreover, at a later point in the petition addressed to the Supreme Court of Virginia, these petitioners made it explicit that their constitutional claims under the Fourteenth Amendment were "[a]s stated in the Petition for Declaratory Judgment."[12] Since the petitioners believed that a specific Virginia statute imposed upon the Board a duty of "evaluation" which was substantially identical to the duty imposed by the Fourteenth Amendment, the Petition to the Supreme Court of Virginia emphasized the statutory duty, but the fact remains that the constitutional duty was plainly called to the attention of the Supreme Court of the State. In a petition for *leave* to appeal (which is closely akin to a certiorari petition filed in this Court), full legal argumentation is neither expected nor required, and in fact the Board's violation of its duty to evaluate the consequences of its action were spelled out in somewhat unusual detail (see Petition for Appeal at 18-22, 42-45).

[12] Petition for Appeal at 37, n.37.

Finally, as to our opponents' suggestion that the Supreme Court of Virginia had no "decent opportunity" to give the constitutional issue "due consideration" and did not rule on it (Dev. Br. at 2, 3), the short answer is that that court itself, in denying leave to appeal, explicitly stated that it had not only "maturely considered" the petition but had "seen and inspected" the "transcript of the record" (Pet. App. B), which obviously included all of the papers filed below, and on that basis it "affirmed" the decision below (*id.*). In these circumstances, we submit, it cannot seriously be suggested that the court below failed to consider and rule upon the contentions raised here.

CONCLUSION

In view of the novelty and importance of the procedural due process issue presented by the record below, the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

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Petitioners' responses to the "gross distortions" and "fundamental" factual "errors" alleged in the opposing briefs (apart from those dealt with in the body of this brief) are as follows:

(1) Both opposing briefs charge error in the petition's factual discussion (Pet. at 4, Para. 3) of petitioners' standing to maintain this suit (Dev. Br. at 7, Para. 1; Bd. Br. at 3, 8).

As evidence of the harmful effects which the Pentagon City development will have upon their properties, petitioners cited an official report of the Arlington County Board which was published less than three years prior to the Board's approval of the Pentagon City development and which demonstrated that high-density development in the Pentagon City area was already adversely affecting the property interests of home owners in petitioners' neighborhoods (PX 4, Pet. at 4). That report was received with other evidence at the trial to show the standing of petitioners to present their claims. At the conclusion of petitioners' (plaintiffs') case the respondents (defendants) in effect moved to dismiss the claims upon the ground, *inter alia,* that the plaintiffs had not proved the requisite injury, but that motion was *denied* (X at 35). Moreover, during their own case the defendants never presented any evidence to show lack of injury and standing; the issue was left uncontested for the remainder of the trial, and the trial court duly stated in its final opinion that plaintiffs (petitioners) had proved their "right to raise the complaint here" (Pet. App. A at 3a). We simply fail to see in what respect our discussion of the issue in our petition can be regarded as involving "fundamental error".[1]

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[1] Our opponents take comfort in quoting a subsequent statement in the trial court's opinion that "The plaintiffs have not proved in

(2) The developers' opposing brief disputes our characterization of the jammed traffic conditions projected by Mr. Pratt as "unacceptable", pointing out (illogically, in our view) that a particularly gloomy traffic forecast for the metropolitan area suggests that such conditions may become prevalent by 1992 (Dev. Br. at 8-9, Para. 4). In fact, there was *undisputed* testimony that the latter report was overly pessimistic (XXIII at 43-56, 77-82), and the fact that certain calamities have been projected does not mean that they are "acceptable". All of the expert testimony at the trial was to the effect that jammed conditions of the kind forecast by Mr. Pratt are totally unacceptable by the standards of the traffic engineering profession, not to mention the public interest (see, *e.g.*, II at 25-26; XVII at 41-45, 64-66).

(3) The Board's opposing brief suggests that traffic computations of the sort done by Mr. Pratt are really not reliable (Bd. Br. at 9, n.1). In fact the record shows that Arlington County's traffic engineers themselves have found such calculations reliable in the past (XVIII at 6), and the record contains a published scientific study showing that such calculations are not only reliable but, if anything, conservative in predicting future traffic congestion of the type projected here (PX 55; XXII at 33-34).

(4) The developers' brief states flatly that the record shows "a variety of specific means to alleviate" the conditions projected by Mr. Pratt, citing Volume XVII of

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terms of dollars that their specific property interests will be harmfully affected by the increased traffic" (Petit., App. A, page 3a, emphasis added). (See Dev. Br. at 7 and Bd. Br. at 8). It is true that the plaintiffs did not attempt to put a dollar figure on the degree of harm, but of course such a quantification would have been totally unnecessary. Significantly, in relying upon the quoted sentence, our opponents have ignored the immediately preceding paragraph in which the trial court held that the plaintiffs had standing.

the transcript at pages 9-10 and pages 26-27 (Dev. Br. at 9). The cited evidence does not support that statement. The testimony at pages 9-10 of the cited volume does not address the problem of jammed traffic conditions within the proposed development, and the testimony appearing at pages 26-27 has nothing whatever to do with the statements set forth in the developers' brief. Moreover, although the Pratt report indicated that there might be four specific ways by which "congestion potential could be minimized" (see Dev. Br. at 10, and 13, n.8), the County Chief of Transportation Planning subsequently testified that none of Mr. Pratt's "suggestions" would actually alleviate the traffic jams which Pratt had projected (XVII at 99-111).[2] According to this record, there is no way to avoid a total breakdown in the traffic system.

(5) The petition stated that no traffic engineer employed by Arlington County or by the developers ever undertook to make the sort of "back-up" statistical analysis necessary to measure the actual traffic consequences of the three intersectional traffic jams forecast in the Pratt Report (Pet. at 6-7). The opposing brief of the Board states that that representation is "false" (Bd. Br. at 9), saying in response (without record citation) that the County staff "reviewed the development and had no fears for the traffic consequences" (*id.*). The latter ambiguous statement hardly shows the "falsity" of the factual assertions made in the petition. Moreover, only one County traffic analyst prepared any written comments on Mr. Pratt's analysis, and that County employee flatly stated that the traffic congestion would probably be far greater than that forecast by Mr. Pratt (PX 63 at page 2).

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[2] Similarly the opinion of the trial court suggests one specific "thing" that "can be done to alleviate" the projected congestion (Pet. App. A at 7a), but there is no record support for the trial court's suggestion on that score.

(6) In our petition we stated that the photochemical oxidant pollution which will be created by the proposed Pentagon City development will "seriously exacerbate" the air pollutional situation in the area, and that statement is challenged in the developers' opposing brief (at 9, Para. 6). The uncontradicted testimony was to the effect that in 1990 photochemical oxidant levels will be dangerous in any event (XVI at 23, 136-37) and that the development, if constructed, will make the situation even worse (VII at 108-09). We fail to see the error in our statement.

(7) The petition suggested that the trial court evidently "misunderstood" what happened before the Board because the court plainly indicated that there had been a conflict in expert traffic evidence before the Board—which were was not (Pet. at 10). Although the suggestion is cited as a "fundamental error" (Dev. Br. at 7), we note that the developers' brief *concedes* the existence of the misunderstanding, saying only that it "proves" nothing (*i.e.*, is irrelevant) (*id.* at 9-10). We disagree. It goes far to explain the erroneous result reached by the trial court below.